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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-850

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Petitioner,

v.

WILLIAM G. WEBER,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

PETER D. EHRENHAFT
Suite 1000
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037

Amicus Curiae
Appointed by this Court

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TABLE OF CONTENTS

Page

POSITION OF AMICUS CURIAE 1

QUESTION PRESENTED 6

STATEMENT OF THE CASE 6

SUMMARY OF ARGUMENT 6

ARGUMENT 8

A. Neither the Constitution nor other applicable law prevents a United States District Court from adopting a rule such as General Order No. 104-D 9

1. The constitutional considerations 9

2. Acts of Congress 18

3. The Department of Justice regulation 27

B. By applying General Order No. 104-D to the facts of this case, a magistrate was not appointed a "special master" within the meaning of 28 U.S.C. § 636(b)(1) or Rule 53(b), Fed. R. Civ. P. 28

1. The Magistrates Act 28

2. Rule 53 34

C. Congress intended to authorize United States District Courts to assign to magistrates duties exemplified by the review of social security cases, and thus there is no necessity for Congress again to consider the matter 38

CONCLUSION 40

TABLE OF AUTHORITIES

Cases:

American Ins. Co. v. 356 Bales of Cotton 1. Pet. 511 12

	Page
Arnold v. Weinberger, Civil No. B -369 (D. Conn. June 24, 1974)	27, 29
Bell v. Weinberger, 378 F.Supp. 198	26, 27, 29, 32
Campbell v. U.S. District Court, 501 F.2d 196	4, 26
Cary v. Curtis, 3 How. 236	12
Crowell v. Benson, 285 U.S. 22	13
Cruz v. Hauck, 515 F.2d 322	10
DeCosta v. Columbia Broadcasting System, Inc. 383 F. Supp. 326	10
Ellis v. Buckhoe, 491 F.2d 716	10
Flowers v. Crouch-Walker Corp., 507 F.2d 1378	26
Givens v. W.T. Grant Co., 457 F.2d 612	26
Hollis v. Weinberger, Civil No. C 74-1120A (N.D. Ga., May 9, 1975)	32
Ingram v. Richardson, 471 F.2d 1268	10, 26, 27, 29
Kimberly v. Arms, 129 U.S. 512	37
Kliban v. United States, Civil No. B-952 (D. Conn. December 2, 1974)	29
Kline v. Burke Constr. Co., 260 U.S. 226	12
La Buy v. Howes Leather Co., 352 U.S. 249	*passim*
Lauf v. E.G. Shinner & Co., 303 U.S. 323	12
Lockerty v. Phillips , 319 U.S. 182	11
Murphy v. Weinberger, Unempl. Ins. Rep. ¶17,608	27, 29
O'Callahan v. Parker, 395 U.S. 258	13
Palmore v. United States, 411 U.S. 389	13
Ex Parte Peterson, 253 U.S. 300	15, 16, 38, 39
Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511	12
Rainha v. Cassidy, 454 F.2d 207	31
Reed v. Board of Election Comm'rs, 459 F.2d 121	10, 26

	Page
Richardson v. Ramirez, 418 U.S. 24	4
Sibron v. New York, 392 U.S. 40	4
Southern Pacific Terminal v. I.C.C., 219 U.S. 498	4
Trice v. Weinberger, 392 F.Supp. 1193	32
TPO, Inc. v. McMillen, 460 F.2d 348	*passim*
United States v. Eastmount Shipping Corp., 62 F.R.D. 437	27
Utah Public Service Commission v. El Paso Natural Gas Co., 395 U.S. 464	5
Wayman v. Southard, 10 Wheat 1	39
Wingo v. Wedding, 418 U.S. 461	16, 17, 18, 26
Yascavage v. Weinberger, 379 F.Supp. 1297	10, 26, 29-30
Constitution, Statutes, Rules and Regulations:	
United States Constitution, Article III	*passim*
United States Constitution, Article III, Section 2	11
10 U.S.C. § 867	13
18 U.S.C. § 3401	20
26 U.S.C. § 6213(a)	11
26 U.S.C. § 7441	13
26 U.S.C. § 7443	13
28 U.S.C. § 604(d)(1)	24
28 U.S.C. § 631(a)	32
28 U.S.C. § 632(a)	35
28 U.S.C. § 634	35
28 U.S.C. § 636	29
28 U.S.C. § 636(b)	19, 22, 24, 29, 33, 39
28 U.S.C. § 636(b)(1)	21, 22, 28, 29, 33
28 U.S.C. § 636(b)(2)	21, 22, 33
28 U.S.C. § 636(b)(3)	22, 33

	Page
28 U.S.C. § 637	33
28 U.S.C. § 1254(1)	6
28 U.S.C. § 1331(a)	14
28 U.S.C. § 1332	12
28 U.S.C. § 1346	11
28 U.S.C. § 1346(a)(2)	11
28 U.S.C. § 1491	11
28 U.S.C. § 1498	11
28 U.S.C. § 1582	11
28 U.S.C. § 2243	16
28 U.S.C. § 2503	15
35 U.S.C. § 141	12
35 U.S.C. § 145	12
35 U.S.C. § 146	12
Act of March 3, 1875, 18 Stat. 470	12
Federal Rules of Civil Procedure:	
Rule 53	*passim*
Rule 53(b)	9, 21, 35, 38
Rule 53(c)	29
Rule 53(e)	29
Rule 53(e)(2)	30
28 C.F.R. § 50.11	27
28 C.F.R. § 50.11(b)	27
28 C.F.R. § 50.11(c)	9
Rule 52, Ct. Cl. Rules	15
General Order No. 104-D (C.D. Cal.)	*passim*
Miscellaneous:	
H.R. Rep. No. 1629, 90th Cong., 2d Sess. (1968)	19
S. Rep. No. 371, 90th Cong., 1st Sess. (1967)	19, 20, 35

	Page
S. Rep. No. 1065, 92d Cong., 2d Sess. (1972)	23, 33, 39
Hearings on the Federal Magistrates Act before Subcommittee No. 4 of the House Committee on the Judiciary, 90th Cong., 2d Sess. (1968)	19, 22
Hearings on S. 1283 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. (1975)	24
114 Cong. Rec. 28364 (1968)	19
114 Cong. Rec. 29407 (1968)	19
Director, Administrative Office of the United States Courts, Annual Report (1974)	31
Ehrenhaft, *Policing Civilians Accompanying the United States Armed Forces Overseas: Can United States Commissioners Fill the Jurisdictional Gap?*" 36 Geo. Wash. L. Rev. 273 (1967)	17
Geffen, *Practice Before the United States Magistrate*, 47 L.A. Bar Bull. 462 (1972)	33
Kaufman, *Masters in the Federal Courts: Rule 53*, 58 Colum. L. Rev. 452 (1958)	38
Comment, *An Adjudicative Role for Federal Magistrates in Civil Cases*, 40 U. Chi. L. Rev. 584 (1973)	34
Note, *Masters and Magistrates in the Federal Courts*, 88 Harv. L. Rev. 779 (1975)	10, 34
Note, *The Validity of United States Magistrates' Criminal Jurisdiction*, 60 Va. L. Rev. 697 (1974)	17, 34
Stern & Gressman, Supreme Court Practice 426 (4th ed. 1969)	4
9 Wright & Miller, *Federal Practice and Procedure* § 2603 (1971)	34

Page

13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, § 3529 (1975) 5
§ 3561 (1975) 12, 14

73 Am. Jur. 2d, Statutes § 255 34

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I.

POSITION OF AMICUS CURIAE

Petitioner, the Secretary of Health, Education, and Welfare, sought and obtained from this Court a writ of certiorari to review a judgment of the Court of Appeals affirming the denial of his motion in the District Court

to vacate the Court's reference to a U.S. Magistrate of Respondent's[1] complaint under the Social Security Act. Respondent neither opposed nor supported Petitioner's motion in the District Court. He did not participate in the interlocutory appeal from the District Court's denial of Petitioner's motion. He filed no opposition to the petition for certiorari. He has, in fact, written a letter to this Court expressly disclaiming any desire to participate in the consideration of the issues Petitioner seeks to have reviewed. (A copy of the letter is included in Appendix A to this brief). Accordingly, this Court, by its order of May 27, 1975, appointed the undersigned as *amicus curiae* and invited the submission of a brief and participation in oral argument in support of the judgment below.

Amicus thus finds lurking at the threshold of this case the issue whether, under Article III of the Constitution, there is a "case or controversy" properly before this Court. It is *amicus'* view that the issues presented do meet the constitutional justiciability standard and, even though one of the parties has declined an active role in these proceedings, the Court nonetheless has the power to determine the issues presented.

The instant struggle is actually between the Department of Justice and the federal District Judges in those

[1] William G. Weber was the plaintiff in a suit seeking judicial review of defendant's denial of benefits under the Medicare provisions of the Social Security Act. Weber has not participated in those aspects of the case with which this Court is now concerned and has, therefore, filed no appearance here. Solely for the sake of convenience, he will be referred to herein as "Respondent" as Petitioner has done in his brief. (*See, e.g.*, Pet. Br. at 2).

districts where local rules have been adopted similar to the one under which Respondent's case was referred to a magistrate.[2]

Petitioner has become the spokesman for the Justice Department's views. Respondent Weber is a hapless bystander. But notwithstanding Respondent's election to stand aside, he has a real dispute with Petitioner on the merits of his complaint and would appear to have an "interest" in a prompt determination of the forum in which he is to have his "day in court."

Petitioner might more properly have sought to test the propriety of the District Court's action by seeking a writ of mandamus directing the Court to vacate its order of reference. In that posture, none would deny that a "case or controversy" was validly before this Court. In *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (a decision discussed in other contexts in some detail in the briefs of both Petitioner and *amicus*), a District Judge's reference of two antitrust cases to a master appointed pursuant to Rule 53, Fed. R. Civ. P., over the opposition of all the parties to the suit, was reviewed here when the litigants obtained a writ of mandamus from the Court of Appeals directing the Judge to vacate his order of reference. In mandamus cases, the Judge's ruling under challenge is normally supported by at least one of the parties to the suit and the Judge is, accordingly, represented by counsel for

[2] The Magistrates Division of the Administrative Office of the United States Courts advises that in at least 30 districts the court rules authorize magistrates to handle social security benefits cases.

the real party in interest.[3] Stern & Gressman, Supreme Court Practice 426 (4th ed. 1969). In *La Buy*, where all the parties opposed his ruling, the Judge was represented by counsel he appointed for this purpose. *Id.* n.12. A comparable procedure might have been followed here.

Nonetheless, even in the somewhat unusual posture of the present case in this Court, the policy considerations underlying the concepts of "case or controversy" in the sense of Article III still appear to obtain. There is nothing "abstract, feigned or hypothetical" about either the dispute between Respondent and Petitioner, or the dispute between the District Judges and Petitioner. *Sibron v. New York*, 392 U.S. 40, 57 (1968). There is a virtual certainty that the dispute between Petitioner and the District Judges will recur frequently, *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 515-16 (1911). and, given the large – and growing – number of potential impecunious claimants like Respondent, there is a poignant and recurrent public interest in clarifying the proper scope of the authority of magistrates in reviewing decisions of the Social Security Administration. See *Richardson v. Ramirez*, 418 U.S. 24, 41 n.13 (1974) (necessity for clarifying duties of officials permits consideration of the case "at least [as] a

[3]This can include the United States Attorney when the decision is favorable to the Government's position. In the context of an attempt to challenge a reference to a magistrate which the government *supported*, the U.S. Attorney served as counsel to the Court to which the writ of mandamus was to be directed. *See Campbell v. U.S. District Court*, 501 F.2d 196, 197 (9th Cir. 1974).

declaratory judgment" subject to Supreme Court review.) Furthermore, there has been and will continue to be ample presentation of adversarial positions in the proceedings to assure this Court that the relevant issues are being thoroughly presented and contested. The National Council of United States Magistrates, albeit nominally as *amicus curiae*, filed a lengthy brief below in support of the District Court's reference. Petitioner's pleadings in this Court and below are certainly adequate to illuminate the issues. And, in accordance with this Court's order, *amicus* is filing this brief in support of the judgment below. The failure of the prevailing interest in a lower court decision to oppose a petition for certiorari or to appear before this Court has not been considered a basis for depriving this Court of the power to determine the justiciable issues presented by a proper petition. See 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, §§3529-30 (1975). Similarly, Respondent's unwillingness to participate in this case should not be viewed as preventing the matter from being regarded as a "case or controversy" in the constitutional – and thus jurisdictional – sense. Cf. *Utah Public Service Commission v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969) (decision on the merits despite motions by appellant and all appellees to dismiss the appeal). Accordingly, *amicus* believes this case is properly before the Court and should be decided.

II.

QUESTION PRESENTED

May a United States District Court properly adopt a rule referring to a United States Magistrate appointed by that Court any case filed seeking judicial review of certain types of executive agency action (such as the denial of benefits claimed under the Social Security Act) for an initial review of the record made in the executive agency and for the preparation of a report and a recommended disposition that is submitted to a District Judge for his consideration in rendering the judgment of the Court.

III.

STATEMENT OF THE CASE

Amicus adopts Petitioner's statement of the case and his recital of the relevant statutes and rules. *Amicus* also agrees that jurisdiction properly rests on 28 U.S.C. §1254(1), subject to the views expressed in Part I, above.

IV.

SUMMARY OF ARGUMENT

The Federal Magistrates Act authorizes the District Courts to adopt rules under which United States Magistrates may be assigned a variety of duties to

enable the courts better to exercise their judicial functions. The legislative history, logic and language of the law support the judgment of the Court below affirming the denial of a challenge to such a rule in the context of a case seeking judicial review of a decision of the Petitioner Secretary of Health, Education, and Welfare refusing benefits claimed under the Social Security Act.

A. Neither the Constitution nor otherwise applicable law prevents a District Court from adopting the practice contemplated by the Federal Magistrates Act by which certain types of matters, likely to be time consuming but relatively routine, are as a matter of court rule referred to a magistrate for initial review and the preparation of a recommended disposition.

B. Under the General Order of the District Court applicable to this case, the magistrate reviewing the record made in the executive agency does not serve as a "special master" within the meaning of Rule 53, Fed. R. Civ. P. Therefore, neither the express language of that Rule nor its judicial gloss apply to the facts before the Court.

C. In enacting the Federal Magistrates Act Congress encouraged the courts to adopt innovative procedures for utilizing a new type of judicial officer. The instant case would appear to illustrate precisely the type of situation in which magistrates could be used effectively. Limited experience to date has demonstrated that the use of magistrates can at least reduce the time needed for disposing of such matters. Thus, it seems both unnecessary and premature to require Congress to reconsider the Act. This Court can and should expressly sanction a procedure adopted by many of the most active and respected District Courts.

V.

ARGUMENT

This should not be a difficult case. It concerns an Act of Congress, consciously enacted after extended consideration, to relieve the indisputably enormous work load of the District Courts. Its language may not be a model of precision and clarity; few Acts of Congress are. But no open-minded reading of its text or legislative history should leave any doubt about its intended meaning – or the correctness of the judgment below in applying it. Simply put, it is the view of *amicus* that United States Magistrates were created to serve as "para-judicial" officers of the courts, to assist, not substitute for, the District Judges in the discharge of the judicial power of the United States. Petitioner has conceded the concept is not constitutionally infirm. Some lower courts have nevertheless expressed in dictum possible constitutional reservations. And the Department of Justice has curiously adopted a policy requiring United States Attorneys to press a highly restrictive interpretation of the Act on the courts, a policy that seems explicable only in terms of constitutional doubts. Accordingly, *amicus* has felt it necessary and appropriate briefly to discuss the constitutional questions. However, in *amicus'* view, as conceived by Congress and as applied in this case, the Magistrates Act should pass constitutional muster and be given the generous, wholly appropriate, interpretation applied by the Court of Appeals.

A. Neither the Constitution nor other applicable law prevents a United States District Court from adopting a rule such as General Order No. 104-D.

1. The constitutional considerations.

Petitioner has expressly denied that this case presents a constitutional question; he suggests it involves solely a matter of statutory interpretation. (Pet. Br. at 22 n.26.) *Amicus* believes, nevertheless, that Petitioner's position is explicable solely in terms of his (or the Department of Justice's) feeling that the broader interpretation given the Federal Magistrate's Act by most of the lower courts might offend Article III. Cf. Pet. Br. at 18 n.18. Petitioner concedes that the expedition of cases is "highly desirable," that references to magistrates of certain types of cases could help to achieve this goal, and that there is, therefore, much to be said in favor of the policy underlying General Order No. 104-D. (Pet. Br. at 31) Yet, the Government has adopted a regulation directing every United States Attorney to oppose the reference to a magistrate of any case if the reference "would be in contravention of the Constitution or Rule 53(b)." 28 C.F.R. §50.11(c) (1973). The Petitioner's motion to vacate the reference of this case is, thus, presumably based upon the Government's view that the reference is unconstitutional; otherwise it should not have moved to vacate, since this case does not involve a utilization (or interpretation) of Rule 53, Fed. R. Civ. P. These considerations prompt *amicus* to discuss, at the outset and in admittedly cursory form, the reasons why he believes utilization of the Federal Magistrates Act as broadly as the Congress intended and

the lower courts have applied it raises no constitutional problem.[4] These considerations similarly prompt *amicus* to urge the Court to lay to rest the Government's constitutional concerns by addressing them in this case.

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[4]More extended discussion of the "perceived tension" between the Magistrates Act and Article III may be found in an excellent law review article reaching the same conclusions as *amicus*: Note, *Masters and Magistrates in the Federal Courts*, 88 Harv. L. Rev. 779, 780-89 (1975). The tensions perceived by some of the Courts of Appeals seem to *amicus* to reflect less the result of a studied examination of the constitutional problem than a visceral antagonism to any denigration of the decision-making process of Article III judges. Further, none of those cases involved situations in which a magistrate was ordered only to review an agency record. *Ellis v. Buckhoe*, 491 F.2d 716, 717 (6th Cir. 1974) (habeas corpus hearing); *TPO, Inc. v. McMillen*, 460 F.2d 348, 352-54, 259 (7th Cir. 1972) (motion for summary judgment); *Reed v. Board of Election Comm'rs*, 459 F.2d 121, 123 (1st Cir. 1972) (preliminary injunction hearing). For decisions perceiving no such tensions *see Cruz v. Hauck*, 515 F.2d 322, 326-28 (5th Cir. 1975) (civil rights case, but expressly considered outside scope of the Magistrate's Act and governed solely by Rule 53); *DeCosta v. Columbia Broadcasting System, Inc.*, 383 F.Supp. 326, 332-34 (D.R.I. 1974) *rev'd on other grounds*, ____ F.2d ____ (1st Cir. 1975) (236 PTCJ A-J, July 17, 1975) (consensual reference for full adjudication); *Yascavage v. Weinberger*, 379 F.Supp. 1297, 1302-03 (M.D. Pa. 1974) (Social Security Act review, comparable to the instant case). The only Court of Appeals decision invalidating a reference in an agency review case – indeed, a Social Security Act case – does not mention the constitutional issue but is based solely on what *amicus* regards as an erroneous construction of the Magistrates Act. *Ingram v. Richardson*, 471 F.2d 1268 (6th Cir. 1972).

a. The judicial power of the United States under Article III.

Article III of the Constitution declares that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." This judicial power extends to the cases enumerated in Section 2 of Article III. Other than the Supreme Court, the federal courts are congressional creations; whose jurisdiction is subject to congressional definition. In fact, the federal courts have been reshaped and reorganized several times since 1789, and changes in the laws regulating the federal judiciary in some measure are introduced at every session of Congress. This Court has sanctioned congressional specification of a particular court for deciding certain types of cases or questions to the exclusion of all other federal courts,[5] or to grant

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[5]*See Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (challenge to war-time price controls properly reserved to Emergency Court of Appeals). The Court of Claims has exclusive jurisdiction over claims against the United States for money damages under the Tucker Act which exceed $10,000. 28 U.S.C. §§1346(a) (2), 1491. Patent infringement suits against the United States, likewise must be filed in the Court of Claims. 28 U.S.C. §1498. Suits challenging tax assessments are exclusively heard by the Tax Court, 26 U.S.C. §6213(a), while refund claims may be heard in the District Court or the Court of Claims. 28 U.S.C. §1346. Suits challenging the assessment of customs duties are exclusively heard in Customs Courts. 28 U.S.C. §1582.

particular types of remedies.[6] And while Article III states that the judicial power of the United States "shall" be vested in the Supreme Court and inferior federal courts, at no time has the entire constitutional power under Article III been conferred upon any federal court. No "federal question" jurisdiction existed until 1875;[7] and Congress has consistently imposed a jurisdictional monetary amount on diversity cases.[8]

b. Other bases of federal judicial power.

While Article III defines the "judicial power" of the United States, federally-created courts have also been granted jurisdiction by the Congress under other articles of the Constitution. As long ago as 1828, this Court held that a territorial court, whose judges did not "enjoy life tenure or undiminished salary protection," could adjudicate an admiralty dispute – clearly a case falling within the purview of Article III.[9] And as

[6] *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323 (1938) (injunction in a labor dispute may not be granted absent prescribed findings). Review of Patent Office Board decisions on the record alone is vested in the Court of Customs and Patent Appeals, 35 U.S.C. § 141, while if additional evidence is to be introduced, actions to compel the issuance of a patent in the District Courts are permitted. 35 U.S.C. § § 145, 146.

[7] 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3561, at 389 (1975); Act of March 3, 1875, 18 Stat. 470.

[8] 28 U.S.C. § 1332. *See also Cary v. Curtis*, 3 How. 236, 245 (1845); *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511 (1898); *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922).

[9] *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511 (1828).

recently as 1973, the Court reaffirmed Congress' power to establish courts that dispose of cases or controversies that would be within the judicial power of the United States if they arose in the states. In *Palmore v. United States*, 411 U.S. 389 (1973), congressional power to create a non-Article III court for the District of Columbia was sustained. The Court explicitly rejected the argument that trial and decision of all federal questions were reserved for Article III judges. Congress has also established "legislative courts" to decide a wide variety of other federal questions, relating to such matters as military discipline,[10] and taxation.[11]

Of perhaps more immediate significance to the instant case, Congress has created a host of administrative agency boards in the executive branch to decide controversies arising under federal law, subject to limited appeal in the "constitutional courts" established under Article III. As the Court said in *Crowell v. Benson*, 285 U.S. 22, 51 (1932) "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." In approving a statutory scheme limiting judicial review of most finding of fact made by an administrative official to considerations of whether they are supported by evidence, the Court in *Crowell* established the authority of administrative agencies to conduct adjudicatory proceedings and to make conclusive fact

[10] 10 U.S.C. § 867. *See, e.g., O'Callahan v. Parker*, 395 U.S. 258, 265 (1969).

[11] 26 U.S.C. § § 7441, 7443.

determinations in controversies otherwise falling within Article III concepts.

c. The need for an Article III judge to decide controversies.

Article III specifies that judges "both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Although other attributes have been engrafted by the courts, the tenure and undiminished compensation safeguards are regarded as the most significant, rooted in the Framers' desires to fulfill the aim of the Declaration of Independence that the Executive be prevented from making "[j]udges dependent on his Will alone, for the tenure of their offices, and the amount of payment of their offices."

A wide variety of cases arising within the Article III federal judicial power have traditionally either been heard in the first instance or decided by officers who do not enjoy the constitutional protections of secure tenure and undiminished compensation. State courts have exclusive jurisdiction to determine various cases arising under the Constitution and laws of the United States.[12] Federal "legislative courts" and administrative

[12] *E.g.*, Federal question cases failing to meet the statutory minimums in suits brought under 28 U.S.C. § 1331(a) (the general "federal question" jurisdictional statute) must be brought in non-federal forums. *See* 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3561 (1975).

agencies in the executive branch, too, have been assigned fact-finding and decision-making functions by the Congress in many specialized areas of federal law – including areas historically subject to common law adjudication.

The Article III federal courts themselves, moreover, have traditionally assigned a portion of their judicial power to subordinate officers such as special masters, commissioners and auditors. Referees in bankruptcy, appointed for fixed terms of years and even exercising the adjudicatory functions of a bankruptcy court, can be closely analogized to the magistrates more recently authorized. This authority to delegate duties has its origins deep in English equity practice and has been generally accepted as inherent in a court, as long as the court reserves to itself the final adjudication of the merits of the litigation. Delegation of a wide range of functions is sanctioned by 200 years of American practice and, under limited circumstances, by the Federal Rules of Civil Procedure.[13] The United States Court of Claims, too, has delegated virtually its entire trial responsibility to trial commissioners who are not constitutional judicial officers.[14]

In *Ex Parte Peterson*, 253 U.S. 300, 312 (1920), this Court noted that

> "Courts have (at least, in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. . . . This power includes authority to appoint persons unconnected with the court to aid judges in the

[13] Rule 53, Fed. R. Civ. P.

[14] 28 U.S.C. § 2503; Rule 52, Ct. Cl. Rules.

performance of specific judicial duties, as they may arise in the progress of a cause."

The parenthetical limitation in the *Peterson* formula has been applied by this Court – once within the context of a reference to a magistrate – and deserves further elucidation. In *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), the Court deplored the "abdication" of an Article III district judge in favor of a special master. But the Court made clear that it was interpreting Rule 53 of the Federal Rules of Civil Procedure in finding that none of the "exceptional conditions" mandated by the Rule as a basis for a reference existed in the case before it; on the contrary, every recited circumstance pointed in the direction of retention of the matter by the Court. The Constitution is not mentioned or cited once in the entire opinion. And in *Wingo v. Wedding*, 418 U.S. 461 (1974), the Court held that the language of the Habeas Corpus Act, 28 U.S.C. §2243, as previously interpreted, required a District Judge personally to conduct evidentiary hearings in habeas corpus actions, notwithstanding some contrary indications in the later-enacted Federal Magistrates Act. The Court expressly stated that it was not required to resolve the question "whether Congress constitutionally may enact legislation vesting authority, pursuant to rule or order of court, in magistrates to hold evidentiary hearings on habeas corpus petitions. We indicate no views as to the validity of investing such authority in a magistrate . . . 'outside the pale of Article III of the Constitution.' " 418 U.S. at 467 n.4. (Quaere whether the comment that a magistrate is "outside the pale of Article III" was intended to suggest a problem with his participation in a case not governed by specific

statutory language such as the Habeas Corpus Act. Cf. the dissenting opinion of The Chief Justice and Mr. Justice White, 418 U.S. at 474.)

The cited footnote in the majority opinion of *Wedding* notwithstanding, it seems clear from the pertinent decisional law that as a constitutional proposition Congress could confer – or permit the courts to confer – substantial duties on United States Magistrates. There may be certain circumstances in which the Constitution would require an Article III judge alone to act, but no such circumstances have been defined in the law to date. Those decisions which have restricted the delegation of judicial functions to United States Magistrates and other non-Article III judges have all been grounded on policy considerations and statutory interpretation, rather than constitutional strictures, although constitutional problems have been superficially perceived and mentioned. In *amicus'* judgment, if there is a constitutional limit on the authority of Congress to authorize non-constitutional judicial officers to hear or adjudicate Article III federal questions, it would probably lie in the area of due process requirements in criminal cases.[15] But this case is not a criminal case nor even, as a habeas corpus proceeding might be regarded, ancillary to a criminal prosecution. This is a case that can and should be decided free of constitutional clouds.

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[15] *See* Ehrenhaft, *Policing Civilians Accompanying the United States Armed Forces Overseas: Can United States Commissioners Fill the Jurisdictional Gap?* 36 Geo. Wash. L. Rev. 273, 291-93 (1967); Note, *The Validity of United States Magistrates' Criminal Jurisdiction*, 60 Va. L. Rev. 697 (1974).

2. Acts of Congress

If the Constitution does not bar the adoption of General Order No. 104-D, no other statute or its equivalent (such as Rule 53, Fed. R. Civ. P.) would appear to do so. This is not a case, such as *Wingo v. Wedding*, in which the Court is called upon to reconcile possibly conflicting statutory texts applicable to a single proceeding. Although Petitioner argued below that the reference of this case to a magistrate was "inconsistent" with the scheme of judicial review envisaged by the Social Security Act, he has expressly denied reliance on that position here. (Pet. Br. at 12 n. 11.) The relevant statutory materials are, thus, exclusively the Federal Magistrates Act and Rule 53.

a. The Federal Magistrates Act.

The Federal Magistrates Act was the product of careful preparatory work by the Judicial Conference of the United States and the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee under the Chairmanship of Senator Tydings. It was the subject of hearings in three sessions of the Congress and underwent substantial revision in the light of comments received from judges, scholars and members of Congress. Its extensive legislative history reflects concern about adherence to the traditional values underlying Article III. But it also reflects a desire and willingness to encourage new approaches for enabling the District Courts to perform their historic judicial functions.

The paramount purpose of the Federal Magistrates Act, as described on the floor of Congress by the managers of the bill, was "to clear congestion in the court dockets," 114 Cong. Rec. 28364 (1968) (remarks of Congressman Poff), by "establish[ing] a system capable of increasing the overall efficiency of the Federal judiciary." 114 Cong. Rec. 29407 (1968) (remarks of Senator Tydings). Both houses of Congress made it clear that this stated goal could be achieved by "cull[ing] from the over-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier of judicial officers." S. Rep. No. 371, 90th Cong., 1st Sess. 9 (1967); H.R. Rep. No. 1629, 90th Cong., 2d Sess. 12 (1968).

In adopting the Magistrates Act, Congress consciously failed to provide an all inclusive list of those "matters that are more desirably performed by" United States Magistrates. It wanted to afford the District Courts maximal room to experiment with the utilization of magistrates and to tailor their employment to the particular problems and requirements of the given court. Senator Tydings, testifying before the House Judiciary Committee, stressed this point:

> "We hope and think that innovative, imaginative judges who want to clean up their caseload backlog will utilize the U.S. magistrates in these areas [specified in § 636(b)] and perhaps even come up with new areas to increase the efficiency of their courts."

Hearings on the Federal Magistrates Act before Subcommittee No. 4 of the House Committee on the Judiciary, 90th Cong., 2d Sess. 81 (1968). Similarly, the Senate Committee Report concluded that if

> "district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts . . . there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal courts."

S. Rep. No. 371, *supra*, at 26.

The Magistrates Act envisioned three principal duties for the new tier of judicial officers being established:

First, magistrates were to be invested with the *authority to decide* in cases involving "minor offenses" against the United States and in which both parties consented to such a trial. 18 U.S.C. § 3401. The statute thus increased the maximum penalties that could be imposed by other than a District Judge. And by transforming the pre-existing office of United States Commissioner, a court official who had been paid on a per-case basis and who had often performed his duties as part-time employment, into a magistrate salaried, and often full-time, the Congress thought it could and would elevate both the quality of the personnel performing this adjudicatory role and the quality of the justice being dispensed in the name of the United States. Although the authority of magistrates to decide minor offense cases is not at issue here, it is relevant in demonstrating that Congress clearly – perhaps even as a matter of paramount interest – intended these newly created officers of the courts to exercise a true judicial function (albeit in a limited class of cases).

Second, magistrates would be *available to act as masters*, subject to the rules, notably Rule 53, Fed. R. Civ. P., applicable to all masters appointed by the

courts. 28 U.S.C. § 636(b)(1). The legislative history is as abundant as Petitioner claims (Pet. Br. at 25-26) to the effect that Congress was aware of this Court's decision in *La Buy* and its concern about references of cases to ad-hoc, non-judicial, part-time referees at added cost and generally inevitable delay to litigants. But Congress also was suggesting that both the full time and part time magistrates created by the Act might henceforth be the most appropriate persons to whom the District Courts could turn when the appointment of masters was appropriate – be that in "matters of account and of difficult computation of damages" routinely authorized by Rule 53(b), or in the "exceptional condition" for other matters as contemplated by the Rule and the gloss it received in the *La Buy* decision.

And, third, Congress seems clearly to have intended that magistrates could and would be assigned duties that would be discharged by the magistrate *qua* magistrate. He was to be a new officer of the court, to be assigned duties never before assigned. While the District of Columbia District Court pre-hearing Examiner was a partial model, his duties were in no way intended to define the limits of the responsibilities the new magistrates could be given. As was made clear by Senator Tydings, throughout the legislative considerations of the Act witnesses described two areas of the District Court's duties in which assistance of the type a magistrate could provide seemed appropriate: consideration of pre-trial motions on such matters as discovery in civil and criminal cases and the review of post-conviction requests for relief in criminal cases. Congress responded by mentioning these matters in § 636(b)(2)

and (3) as examples of duties that could be referred to magistrates.[16] But the enumeration was not intended to limit the types of functions the magistrates could perform in their role as magistrates. The specific language of § 636(b) could not be plainer in providing that magistrates may be given duties that "may include but are not restricted to" those listed.

In *amicus'* view, Petitioner has not adequately distinguished between these three separate functions envisioned by Congress and accepted by the courts. Thus, he suggests that Congress intended magistrates "to have only limited authority." Pet. Br. at 8, 13. Congress did intend magistrates to have only limited "authority," if "authority" means the power to decide. The "authority" of magistrates to decide was to be limited to the trials of minor offenses and the circumstances under which any master, considering a matter referred to him under Rule 53, Fed. R. Civ. P.,

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[16]Senator Tydings, Chairman of the Senate Subcommittee on Improvement in Judicial Machinery, testified:

> "The Magistrates Act specifies these three areas [§ 636(b)(1), (2) and (3)] because they came up in our hearings and we thought they were areas in which the district courts might be able to benefit from the magistrate's services. We did not limit the courts to the areas mentioned. Nor did we require that they use the magistrates for additional functions at all.
>
> "We hope and think that innovative, imaginative judges who want to clean up their caseload backlog will utilize the U.S. magistrates in these areas and perhaps *even come up with new areas to increase the efficiency of their courts.*" (emphasis added)
>
> Hearings on the Federal Magistrates Act before Subcommittee No. 4 of House Committee on the Judiciary, 90th Cong., 2d Sess. 81 (1968).

would have authority to act. But the Act was significantly broader than a grant of "authority." It contemplated a function of aid and assistance through as many innovative and useful procedures as the District Courts could envision, so long as the rule and the reality of actual decision-making remained with the District Judges.

Developments subsequent to the enactment of the Act confirm that view:

First, the Senate Report accompanying H.R. 7375, 92d Cong., 2d Sess. (1972), a bill enacted in 1972 to amend the Federal Magistrates Act by raising the salary ceiling for U.S. Magistrates, states:

> "Magistrates are judicial officers of the Federal district courts . . . . They may also be authorized to screen prisoner petitions, hold pre-trial conferences in civil and criminal cases, hear certain preliminary motions, *review social security appeals,* review Narcotics Addict Rehabilitation Act matters, and serve as special masters. In short, they render valuable assistance to the judges of the district courts, thereby freeing the time of those judges for the actual trial of cases." S. Rep. No. 1065, 92d Cong., 2d Sess. 3 (1972) (emphasis added).

The report was written by the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, the same subcommittee that considered the Federal Magistrates Act.

Second, the Administrative Office of the United States Courts has disseminated a "checklist" authorized by the Judicial Conference which sets forth those duties which the Conference considers appropriate for assignment to magistrates under the Act. This checklist provides that magistrates may review the record of

administrative proceedings and prepare a report and recommendations specifically in cases regarding the denial of benefits to claimants under the Social Security Act. This interpretation of the intent of Congress in the enactment of § 636(b) is of particular significance not only because it was distributed by the Director of the Administrative Office of the United States Courts, who is charged by law (28 U.S.C. 604(d)(1)) to supervise all administrative matters relating to the offices of the United States Magistrates, but also since the Administrative Office took a leading role in the development of the Act.

Third, United States District Court Judge Charles M. Metzner, Chairman of the Judicial Conference Committee on the Administration of the Federal Magistrates System, testified earlier this year before a Senate subcommittee considering a bill that would further define the jurisdiction of United States Magistrates, saying:

> "Essentially the magistrate is a judicial officer. He discharges his responsibilities *qua* magistrate, and this is made clear in the proposed subsection 636(b)(1). Any other responsibilities, such as a special master assignment, are set forth in a separate subdivision of section 636(b). It was the lack of clarity in expressing this concept that led to many of the judicial decisions limiting the use of magistrates contrary to what appeared to have been the intent of Congress. In any event, the proposed language clarifies what we think was the original intent in creating the office of magistrate . . ."[17]

[17]Hearings on S. 1283 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. 10-11 (transcript of report of proceedings) (1975).

That portion of Judge Metzner's testimony tracks almost verbatim the commentary accompanying a proposed amendment to the Federal Magistrates Act adopted by the Judicial Conference of the United States on March 7, 1975, which reveals that the Conference understood that Congress intended to distinguish a magistrate acting *qua* magistrate as in an administrative review from a magistrate acting *qua* special master.

b. Rule 53, Federal Rules of Civil Procedure.

Rule 53 describes the circumstances under which cases may be referred to special masters. The Magistrates Act specifically contemplates that insofar as magistrates are appointed masters, the reference will be made pursuant to Rule 53. There is no dispute on this issue.

What is disputed is that Rule 53 in any way applies to a reference to a magistrate when the magistrate is not acting as a special master but is performing one of the other duties he has been authorized to perform by the Act and the appointing court. As is discussed in greater detail below, *amicus* finds no basis in the law or in policy for applying Rule 53 to those situations. As is suggested in Judge Metzner's recent testimony on proposed clarifying amendments to the Act, some of the lower courts have declined or vacated references because the reference to the magistrate was viewed as a reference to a master. In *amicus'* view, these cases were either correctly decided, since the order of reference under consideration would have required the magistrate

to serve as a *de facto* master, or they were incorrectly decided because the court failed to distinguish between the duties of the magistrate in his two possible roles:[18] *Ingram v. Richardson*, 471 F.2d 1268 (6th Cir. 1972) (incorrectly viewed reference of Social Security Act review as appointment of master); *TPO, Inc. v. McMillen*, 460 F.2d 348 (7th Cir. 1972) (correctly viewed non-consensual reference to magistrate of motion to dismiss as granting adjudicatory functions beyond scope of Magistrates Act); *Reed v. Board of Election Comm'rs*, 459 F.2d 121 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972) (correctly viewed reference of motion for preliminary injunction, requiring hearing, as beyond scope of Magistrate's Act).

Arrayed against these decisions are many more, some specifically in the context of Social Security Act reviews, that affirm the inapplicability of Rule 53: e.g., *Yascavage v. Weinberger*, 379 F. Supp. 1297 (M.D. Pa. 1974) (Social Security Act case); *Bell v. Weinberger*, 378 F. Supp. 198 (N.D. Ga. 1974) (Social Security Act case); *Givens v. W.T. Grant Co.*, 457 F.2d 612 (2d Cir.), *vacated on other grounds*, 409 U.S. 56 (1972) (class action determination); see also *Campbell v. United States Dist. Court*, 501 F.2d 196 (9th Cir. 1974) (motion to suppress in a criminal case).

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[18] *Wingo v. Wedding*, 418 U.S. 461 (1974) is not considered here since it was essentially an interpretation of the Habeas Corpus Act which the Court held was not modified by the subsequently-enacted Federal Magistrates Act. Nor is *Flowers v. Crouch-Walker Corp.*, 507 F.2d 1378 (7th Cir. 1974), discussed, as it revolves around an interpretation of provisions of the Civil Rights Act of 1964.

3. The Department of Justice regulation

In December 1973, prior to any extended experience with the Magistrate's Act, the Department of Justice adopted its regulation directing what may aptly be called "massive resistance" to the reference of cases to magistrates. 28 C.F.R. § 50.11. *Amicus* has been unable to find any contemporary expression of the Department's reasons for adopting the regulation. It was presumably based on the then-recent decisions in *Ingram* and *TPO*, discussed above. See 28 C.F.R. § 50.11(b). It is worth noting, however, that able District Judges, including Judge Jon O. Newman of the District of Connecticut (a former law clerk to Chief Justice Warren) and Judge Marvin E. Frankel of the Southern District of New York (a former Professor on the faculty of the Columbia Law School) have either implicitly or expressly criticized the Department's regulation. See *Arnold v. Weinberger*, Civil No. B-369 (D. Conn. June 24, 1974) (denying a motion by the Secretary of Health, Education, and Welfare to vacate a reference of a Medicare reimbursement case to a magistrate); *United States v. Eastmount Shipping Corp.*, 62 F.R.D. 437 (S.D.N.Y. 1974) (declining to refer to a magistrate as a "master" a claim by the United States against a carrier for cargo damage amounting to about $10,000). As indicated above, it seems explicable only as an expression of constitutional unease.[19] If no

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[19] One court concluded that: "At bottom, the Justice Department is evidently voicing a constitutional concern over excessive delegation of authority to magistrates amounting to an abdication of the judges' Article III powers and responsibilities. *Murphy v. Weinberger*, Unempl. Ins. Rep. ¶17,608, at 2153, 2156 (D. Conn. 1974) quoted in *Bell v. Weinberger*, 378 F. Supp. 198, 202 (N.D. Ga. 1974).

constitutional infirmity to references is now perceived by the Department, then rather than recommending to the Court that it refer this matter to Congress for a re-examination, it should consider an internal re-examination of what Judge Frankel called its "uncompromising position." 62 F.R.D. at 441. *Amicus* does not believe the regulation should stand in the way of the reference challenged in this case.

B. By applying General Order No. 104-D to the facts of this case, a magistrate was not appointed a "special master" within the meaning of 28 U.S.C. §636(b)(1) or Rule 53, Fed. R. Civ. P. Therefore, neither the language of the cited Rule nor its judicial gloss are grounds for vacating the reference.

1. The Magistrates Act does not make a reference of a case of this type a referral to a "master."

General Order No. 104-D, on its face, distinguishes between the appointment of magistrates as masters, (Pet. App. E, at 17A) and the reference of Social Security Act and comparable cases to magistrates for recommended dispositions. (Pet. App. E, at 15A-16A). This reflects the Court's understanding of the distinct roles the Congress envisioned for the new "para-judicial officers."

That a magistrate reviewing the agency record in a case seeking judicial review of decisions by the Secretary of Health, Education, and Welfare under the Social Security Act is not acting as a master, but in the new role established for him by the Magistrate's Act, has been recognized by most courts that have

considered the issue. Only in *Ingram v. Richardson*, 471 F.2d 1268 (6th Cir. 1972), did that Court of Appeals assume that a reference of a social security case had to be made under § 636(b)(1), rather than the broader language of the introductory paragraph of § 636(b).

Other courts[20] have rejected the 6th Circuit's analysis recognizing that a magistrate reviewing the agency record in a social security benefits cases is not a "master" acting under § 636(b)(1). The point is perhaps best captured by Chief Judge Sheridan in *Yascavage v. Weinberger*, 379 F. Supp. 1297, 1299-1300 (M.D. Pa. 1974):

> "The holding [in *Ingram*] that the case was, and apparently could only be, referred to the magistrate pursuant to § 636(b)(1), appears to be an unduly restrictive interpretation of § 636 . . . . Service as a master may involve all incidents of a non-jury trial, including the reception of documentary evidence and the taking of testimony where credibility based on demeanor of the witness may be important. The master may also rule on the admissibility of evidence and make findings of fact and conclusions of law: . . . [Reference is made to Rule 53(c) and (e) of the Federal Rules of Civil Procedure]. In a Social Security case, however, there is no trial, no evidence is received and no witnesses are heard;

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[20] *Yascavage v. Weinberger*, 379 F. Supp. 1297 (M.D. Pa. 1974); *Bell v. Weinberger*, 378 F. Supp. 198 (N.D. Ga. 1974); *Kliban v. United States*, Civil No. B-952 (D. Conn., December 2, 1974); *Arnold v. Weinberger*, Civil No. B-369 (D. Conn., June 24, 1974); *Murphy v. Weinberger*, Unempl. Ins. Rep. ¶17,608, at 2153 (D. Conn. 1974).

> rather, the matter is decided on a record developed at the administrative level. The review of a Social Security action involves only the question of law as to whether the Secretary's decision is supported by substantial evidence, and whether proper legal standards were applied . . . . Whether the case is considered initially by the court or the magistrate, disagreement with the Secretary's findings is not permitted when they are supported by substantial evidence. The court, in reviewing the magistrate's report, has before it the same record that the magistrate had before him – a record developed by the Secretary."

A master's authority to make findings of facts is a potentially critical function, as Rule 53(e)(2) dictates that "[i]n an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous." In contrast, the magistrate's written discussion and opinion of the merits of a typical social security review are but a recommended ruling as a matter of law fully open to scrutiny and acceptance or rejection by the judge on the same documentary record of fact as that before the magistrate. There is, therefore, no basis for Petitioner's argument that the District Courts are doing indirectly what they could not do directly by referring administrative review cases to magistrates without designating those officers as special masters. It is not the label that counts; it is the substance. And, in substance, the magistrate is performing a new function not contemplated or covered by Rule 53 but very much contemplated by Congress both when it passed the Magistrates Act and, insofar as current evidence is available, since its enactment.

Petitioner analogizes the magistrate to the master with the suggestion that, *de facto*, the magistrate's

recommendation is accepted as though it were a master's findings; in the more colorful language of the First Circuit, that, as with master's findings there may be little more than "a pro forma laying on of the hands by the district court." *Rainha v. Cassidy*, 454 F.2d 207, 208 (1st Cir. 1972) (Pet. Br. at 28-29). Petitioner states that in none of the social security cases referred to magistrates in fiscal 1974 in the Central District of California and the Northern District of Georgia did the court reject the magistrate's recommended decision. (*Id.*). At best, this claim is statistically meaningless because the sample includes only 38 of 277 social security cases in which magistrates filed a report and recommendation throughout the United States.[21] Annual Report of the Director, Administrative Office of the United States Courts 146 (1974). At worst, the claim is deceptive. *Amicus* is advised by a magistrate in the Central District of California that the magistrates of that Court handled 10 social security cases in fiscal 1974; in six, the magistrate's recommendation was neither adopted nor rejected because there was a stipulated remand to the Secretary of the Department of Health, Education, and Welfare; in the remaining four cases, the magistrate's recommendation was adopted, but importantly in three of these neither party to the action exercised its right under the Court's rule

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[21]The Administrative Office of the United States Courts has advised *amicus* that in fiscal 1975, the number of social security cases in which magistrates filed reports (according to preliminary statistics) had increased by 94% to 537; that in the Central District of California the number had increased from 10 to 50; and that in 29 Districts at least one such report was filed.

to submit an objection to that recommendation. In the fourth case the government did file an objection, and although the District Judge adopted the magistrate's recommendation, his decision was in the form suggested by the United States Attorney and not that of the magistrate. A District Judge in the Northern District of Georgia has expressly stated that his District Court reviews all reports and recommendations of magistrates and makes its own independent judgment, citing two cases (not from fiscal 1974) in which the court did not follow the magistrate's recommendation and one case in which the court followed the recommendation but for different reasons. *Bell v. Weinberger,* 378 F. Supp. 198, 201 n.16 (N.D. Ga. 1974). Further, in fiscal 1975, the court rejected the recommendation of the magistrate in at least two cases. *Hollis v. Weinberger,* Civil No. C 74-1120A (N.D. Ga. May 9, 1975); *Trice v. Weinberger,* 392 F. Supp. 1193 (N.D. Ga. 1975).

Certainly it should come as no surprise that in practice the District Courts usually adopt the magistrates' recommended decisions. That fact should prove the competence with which the magistrates are fulfilling their duties, rather than reflect on a lack of diligence by busy District Judges. (Cf. Pet. Br. at 29). United States Magistrates are chosen by a selection process in which all of the Judges of a District Court participate. 28 U.S.C. § 631(a). In the Central District of California, from which this case arises, the initial three magistrates were chosen from more than 125 attorneys who filed written applications with a District Court screening committee, with each of the three that was selected subjected to the same extensive FBI screening procedures that are applied to all federal judicial

appointees. Geffen, *Practice Before the United States Magistrate,* 47 L.A. Bar Bull. 462, 465 (1972). The Magistrates Act also directs the Federal Judicial Center to conduct periodic training programs and seminars for magistrates. 28 U.S.C. § 637. The Magistrates Division of the Administrative Office of the United States Courts advises that the training programs typically offer a session on handling social security cases.

Additional support for the contention that the reference to the magistrate at issue is pursuant to the broader "additional duties" language of § 636(b) and not pursuant specifically to § 636(b)(1) and its special master authorization can be found in the Senate Report to H.R. 7375, which, as previously pointed out (p. 23, *supra*), amended the salary ceiling provision of the Federal Magistrates Act. It lists disjunctively the review of social security cases and service as a special master in a list of duties that a magistrate may be authorized to perform. S. Rep. No. 1065, *supra,* at 1.

Further, the "checklist" disseminated by the Administrative Office of the United States Courts on behalf of the Judicial Conference, referred to above (p. 23, *supra.*), provides that apart from service as a special master, other duties which a magistrate may assume include the review and preparation of a report and recommendations on cases which come before the court on a developed administrative record, particularly Social Security Act cases.

In sum, Petitioner would ignore the statutory directions that the enumerated duties of § 636(b)(1), (2) and (3) are illustrative only. He would have the Court disregard the authority expressly given the District Courts to assign to magistrates a variety of

other duties consistent with their legal status as "para-judicial officers." The Court should give the Act no such crabbed interpretation.

2. Rule 53 does not apply to this case directly; nor do the policy bases for the Rule apply.

The Department of Justice's regulation, expressing a pronounced antipathy to the use of magistrates, purports to be based on the Constitution and on Rule 53, Fed. R. Civ. P. As has already been discussed, *amicus* does not share the Department's constitutional doubts. Even less does he believe the text of Rule 53 or its policy underpinnings require a result other than the one reached by the court below.

As a simple matter of statutory interpretation, it can be said that the Magistrate's Act, to the extent that it conflicts with Rule 53, is a later expression of the legislature's will and, thus, should prevail. See 73 Am. Jur. 2d, Statutes § 255, at 426 (1974). This is no idle suggestion, since it seems to be the fact and is the consensus of commentators[22] that the policy foundations for Rule 53 were considered by Congress but were viewed as applicable only to the use of magistrates when appointed as masters.

[22] *See e.g.*, 9 Wright & Miller, Federal Practice and Procedure § 2603, at 780 (1971); Comment, *An Adjudicative Role for Federal Magistrates in Civil Cases*, 40 U. Chi. L. Rev. 584, 586-588 (1973); Note, *Masters and Magistrates in the Federal Courts*, 88 Harv. L. Rev. 779, 791 (1975); *But see* Note, *The Validity of United States Magistrates' Criminal Jurisdiction*, 60 Va. L. Rev. 697, 706-708 (1974).

Rule 53 would seem to express the view of the Court and Congress, first, that unrestricted references to special masters result in an abdication of the decision-making responsibility that is properly that of the district judges, and, second, that the employment of masters adds appreciably – and improperly – to the parties cost and length of litigation. But neither of these considerations should inhibit the reference of a Social Security Act review to a magistrate.

The first concern was succinctly articulated in *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1956), in which the Court stated that the references of two antitrust cases to a special master were improper because

> "[t]hey amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation."

But more specifically, the court held that it was an abuse of discretion and contrary to the express limitations of Rule 53(b) for a District Judge (1) who had for five years dealt with a myriad of weighty preliminary pleas and motions (2) in cases involving alleged antitrust violations, a class of case in which the judge was himself possessed of great expertise, (3) under circumstances where it was estimated the trial of one case alone would take six weeks and it was reasonable to conclude that much time would be saved at the trials if the Judge heard the cases because of his familiarity with the litigation, (4) over the objection of all parties, (5) referred the entire trials of all issues of fact and law (6) to an active practicing attorney, (7) relying principally upon congestion of his own trial

calendar and the complexity of the cases to justify the references.

No set of facts is more contrary to the circumstances of the present reference. The District Judge has not even seen Respondent's complaint; it was referred under a General Order when filed with the Court. The case calls for a review of a very narrow kind, involving little prospect of complexity but much certainty of laborious search of an administrative record, already made and closed, for the presence or absence of substantial evidence to support the Secretary's findings. It is not the type of case requiring a special expertise by the District Judge. The referral is not for the trial of the case, but only for a thorough study of the record, supplemented, if necessary, by argument, written or oral. The reference is not to a practicing lawyer with distracting other occupations but to a full-time judicial officer, who is the product of an extended selection process. The order is not one Judge's exasperated act to be rid of a troublesome burden but is the product of the entire District Court bench of 16 active Judges, exercising the discretion expressly granted them by Congress in the Federal Magistrates Act. And most importantly, no aspect of the recommendation of the magistrate need be accepted by the District Judge. He is compelled to make an independent judgment. Therefore, the litigants' entitlement to the decision of a Judge of the Court is not at all infringed – unless one makes the unwarranted assumption that the District Judge will fail to perform his duties and resort to a proscribed "pro forma laying on of the hands," an assumption this Court need not and should not make. It should be stated unequivocally that the procedure

under review entails no abdication of the decision-making responsibility of the District Court,[23] which was the primary concern of Congress when it wrote into the Act the requirement that the provisions of the Federal Rules of Civil Procedure be followed in references to magistrates as special masters. S. Rep. No. 371, *supra*, at 25.

The second basis for the "exceptional circumstance" requirement – that a reference to a special master causes the litigants added expenses and delay – is also not a problem here. There has been neither unnecessary expense nor delay when magistrates review Social Security Act cases, at least as far as experience to date may be a guide. Magistrates are compensated by Congress, 28 U.S.C. § 634, and not by the parties; magistrates may not engage in any employment "inconsistent with the expeditious . . . performance of their duties," 28 U.S.C. § 632(a), so that the typical delays caused by the preoccupation of masters with other occupational interests is avoided. Indeed, the scanty evidence to date shows that social security cases referred to magistrates require less time for final decision at the District Court level than cases not so referred. See Pet. Br. at 31 n.38.

The Senate Report that accompanied the Federal Magistrates Act mentions a staff memorandum of the Subcommittee on Improvements in Judicial Machinery which analyzed existing law deemed relevant to the assignment of magistrates as masters. S. Rep. No. 371, *supra*, at 25. Pointing out that the Supreme Court has never established specific guidelines for determining the

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[23] *Cf. Kimberly v. Arms*, 129 U.S. 512, 523-24 (1889).

"exceptional conditions" contemplated by Rule 53(b), the staff memorandum, quoting Kaufman, *Masters in the Federal Courts: Rule 53,* 58 Colum. L. Rev. 452, 457 (1958), concluded that "[i]f the master's function is basically ministerial, then the reference is permissible since 'there is little if any abdication of the judicial function and such matters, rather than tying up the courts, can be more profitably referred to a master.'" In *amicus'* view, the role of a magistrate in a Social Security Act review is quite accurately labeled as basically ministerial. His function is only to aid the District Judge in making a fair, organized, and expeditious decision. This function is in full accord with the directive of *La Buy* that

> "[t]he use of masters is 'to aid judges in the performance of specific judicial duties, as they may arise in the progress of cause,' *Ex Parte Peterson,* 253 U.S. 300, 312 (1920), and not to displace the court." 352 U.S. at 256.

C. Congress intended to authorize United States District Courts to assign to magistrates duties exemplified by the review of social security benefits cases, and thus there is no necessity for Congress again to consider the matter.

It would be redundant to recount the compelling evidence that indicates Congress intended the Federal Magistrates Act to authorize magistrates to assume duties exemplified by the review of social security benefits cases. Congress did not specifically mention social security cases in the course of its initial consideration of the Act, but did so mention them in reports

accompanying subsequent legislative action. S. Rep. No. 1065, *supra,* at 3. The authority of magistrates to perform such administrative reviews thus seems to fall within the Act's boundaries as defined by its stated purpose, language, and legislative history. The spirit of the statute, which calls for an expansive construction of its terms, is clearly conveyed by its prescription in § 636(b) that the District Courts are authorized to adopt rules assigning to magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States."

Amicus therefore believes that Congress has amply expressed its will as to the roles that may be assigned to magistrates. One such role includes the review of executive agency actions as assigned by General Order No. 104-D. Having spoken on the issue, Congress need not speak again. And should the Court mistake congressional intentions, the expansive construction *amicus* urges the Court to adopt can always be modified through congressional revision.

As long ago as 1825 this Court affirmed the ability of all courts to establish rules for the conduct of their judicial business. See *Wayman v. Southard,* 10 Wheat. 1, 42 (1825). This has been read to include the right to provide personnel assistance. *Ex Parte Peterson* 253 U.S. 300 (1920). If neither constitutional nor policy barriers prevent the courts from creating their own helpers, much less utilizing assistants (and assistance) offered by the Congress, why should not the Court accept – indeed, welcome – the innovative procedures the legislature hoped would be applied? There is no sense in remanding to the House of Representatives and Senate. It is the Justice Department that should reconsider its position.

CONCLUSION

This Court needs no *amicus* to recount the increasing caseloads of the District Courts. Suits of just the kind brought by Mr. Weber are among those being filed in exponentially growing numbers. This is a trend that will not be arrested so long as the Nation is committed to expanded social welfare benefits – and no less committed to judicial review of governmental actions withholding benefits claimed.

In enacting the Magistrates Act, the Congress took steps to aid the federal courts in coping with these and their numerous other tasks. But the Constitution limits the types of aides on whom the courts may call for help. The magistrates authorized by this legislation, when used as contemplated by General Order No. 104-D, fit within those limits. No sound policy grounds have been offered for not using them to the fullest extent the Congress intended, the Courts desire and the Constitution and law allows. The judgment of the Court of Appeals should, accordingly be affirmed.

Respectfully submitted,

PETER D. EHRENHAFT
Amicus Curiae, appointed
by this Court*

August 8, 1975

**Amicus* acknowledges with sincere appreciation the assistance of Jonathan L. Kempner, a student entering the third year class at the Stanford University School of Law.

APPENDIX

EXHIBIT A

In Re: [illegible] [illegible]

To the – Supreme Court of the United States
Office of the Clerk,
Washington, D. C. 20543

Gentlemen: Attention, Mr. Michael Rodak, Jr. (Clerk)

Thank you for your letter of March 17, 1975, relative to the matter of the writ of Certiorari filed in the captioned matter. You have set forth that the Court has directed your office to request a response, and referred to certain printed copies together with proof of service factors. It is not clear as to whether this was directed to me for action on my part. If so, I hasten to advise that all of the prior record has indicated that I was taking no part in the APPEAL factor instituted at the outset in order to establish the method of Jurisdiction, i.e. JUDGE OR MAGISTRATE. Since there was never a question of preference on my part either way, I naturally would harbor no arguments on the issues set forth by the opposing sides of the question. I was originally advised in the circumstances that there was no need for me to be involved in matters of procedure toward such determination, and this is the status I have been adhering to. I understand that the

office of Attorney Michael P. Balaban, Esq., has been representing the opposition.

Very Sincerely Yours,

/s/ William G. Weber – in Pro [illegible]

Note – My present Mailing address.
P. O. Box 302,
Sierra Madre, Calif., 91024